UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

(Santa Clara, CA)

UACC MIDWEST, INC., TCI CABLEVISION OF GEORGIA, INC., and TCI CABLEVISION OF CLEVELAND, INC., d/b/a A.T. & T. BROADBAND	Employer[1]	
and		
JAMES F. McGRAW, JR.	Petitioner	Case 32-RD-1366
and		
TEAMSTERS LOCAL NO. 78, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO	Union[2]	

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

---

[1] The name of the Employer appears as amended at the hearing.

[2] The name of the Union appears as amended at the hearing. In this regard, I take administrative notice that in early 2000 the Union became the successor to Teamsters Union Local No. 296, herein called Local No. 296, which prior to that time had been the designated and recognized collective bargaining representative of the employees involved herein. I also note that no party is disputing the Union's status as the lawful successor to Local No. 296. I finally note that the Union was incorrectly identified as "Petitioner" in paragraphs 3 and 4 of Board's Exhibit 2.

2. The parties stipulated, and I find, that the Employer is engaged in providing cable television and other services from a facility located in Santa Clara, California. During the past twelve months the Employer derived gross revenues in excess of $100,000 and during that same period of time purchased and received goods valued in excess of $5,000 which originated from outside the State of California. In such circumstances, I find that the Employer is engaged in commerce within the meaning of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated, and I find, that the Union is a labor organization with the meaning of the Act.

4. The Union represents the employees in the bargaining unit involved in this case.

5. For the following reasons, I find that a question affecting commerce exists concerning the representation of the employees involved in this case and that it will effectuate the purposes of the Act to process the petition herein.

The record discloses that Local No. 296 and the Employer were parties to a collective bargaining agreement which expired on March 31, 2000.[3] That collective bargaining agreement covered a unit of the Employer's Santa Clara installer trainees, installers, advanced installers, technician trainees, installer technicians, service technicians, system technicians, advanced technicians, construction trainees, construction persons B, construction persons A, warehouse persons, and warehouse trainees.

On January 28, James F. McGraw, Jr., the Petitioner in this case, filed a decertification petition in Case 32-RD-1353. On March 9, Local No. 296 filed an unfair labor practice charge against the Employer in Case 32-CA-17950-1. That charge alleged that the Employer violated Sections 8(a)(1) and (5) of the Act by failing and refusing to implement a Section 401(k) plan provided for in the parties' collective bargaining agreement, unilaterally discontinuing dues checkoff deductions, unilaterally transferring Santa Clara unit work to its non-union San Jose facility, and encouraging and assisting employees to circulate a decertification petition. The charge in Case 32-CA-17950-1 blocked further processing of the decertification petition in Case 32-RD-1353. On April 6, Local No. 296 filed an amended charge in Case 32-CA-17950-1. That amended charge alleged that the Employer violated Sections 8(a)(1), (3) and (5) of the Act by having non-unit employees employed by the Employer at its San Jose, California facility perform bargaining unit work; having Santa Clara unit employees reporting for work and/or working at the Employer's non-union San Jose facility; failing to implement a Supplemental Income Trust fund provided for in the parties' contract by failing to provide forms related to that fund to unit

[3] All dates hereafter refer to 2000, unless otherwise indicated.

employees; and placing employee Robert Robinson on administrative leave and/or light duty work because of his union activities. On April 7 the undersigned approved Local No. 296's request to withdraw the unilateral discontinuance of dues checkoff and encouraging and assisting employees' decertification efforts allegations in Case 32-CA-17950-1. On that same date the undersigned placed in deferral status the remaining allegations in Case 32-CA-17950-1 pending the outcome of grievance-arbitration proceedings involving those same matters.

On May 23 the Union and the Employer entered into a "Memorandum of Agreement" resolving certain of the outstanding issues involved in Case 32-CA-17950-1. That Memorandum of Agreement specified that the Employer could use non-unit San Jose employees to perform limited work at and for the Employer's Santa Clara operations; that under certain conditions the Employer could send Santa Clara unit employees to perform work at the Employer's San Jose facility; and that, if necessary, the Employer could use non-unit employees to launch a telephony service in Santa Clara. That Memorandum of Agreement by its terms is effective until November 23, "at which time the parties agree to meet and consider whether it should be extended, terminated or modified." On that same date the Union and the Employer entered into a separate agreement resolving that charge's issues relating to Robert Robinson.[4]

On July 18, Petitioner James F. McGraw, Jr. filed the petition in this case. On August 17, the undersigned approved the Union's request to withdraw the charge in Case 32-CA-17950-1. On August 21, the undersigned approved James F. McGraw, Jr.'s request to withdraw his petition in Case 32-RD-1353.

Based on the foregoing, the Union contends that the petition in this case should be dismissed. In support of its position, the Union notes that the Employer's alleged unfair labor practices predated the filing of the petition in this case, that the Union and the Employer entered into a number of non-Board adjustments resolving those unfair labor practices issues, and therefore under *Douglas-Randall, Inc.,* 320 NLRB 431 (1995), *Liberty Fabrics, Inc.*, 327 NLRB No. 13 (1998), and *Supershuttle of Orange County, Inc.*, 330 NLRB No. 138 (2000), the petition should be dismissed.

I have considered the Union's arguments but find that *Douglas-Randall, Liberty Fabrics* and *Supershuttle of Orange County* do not require dismissal of the petition herein. While it is true that in each of those cases a Board or non-Board settlement resulted in the dismissal of a decertification petition or a representation petition filed by a rival union, those cases also involved unfair labor practice allegations which went to the heart of the parties' bargaining relationship, i.e., either an outright refusal to recognize (*Douglas-Randall*), a unilateral partial shutdown/layoff and direct dealing with employees (*Liberty*

[4] The charge's allegation that the Employer failed to implement a contractual Section 401(k) and/or supplemental income trust fund was resolved by a separate oral understanding under which the Employer agreed to hold a meeting with unit employees to explain and facilitate employee enrollment in the plan.

Fabrics), or surface bargaining during negotiations for an initial contract (*Supershuttle of Orange County*). In this case the Employer's alleged Section 8(a)(5) unfair labor practices that were resolved by the parties involved its use of non-unit employees to perform unit work (because of the lack of unit employees to perform that work) and its apparent failure to distribute certain forms to unit employees relating to a supplemental income trust fund. These alleged unfair labor practices do not have a serious or substantial impact on the parties' bargaining relationship in comparison to those involved in *Douglas-Randall*, *Liberty Fabrics* and *Supershuttle of Orange County*. By their nature they do not warrant any presumption that the decertification activities involved this case (or in its predecessor petition) were influenced by that alleged misconduct. Cf. *Liberty Fabrics*. Accordingly, I find that *Douglas-Randall*, *Liberty Fabrics* and *Supershuttle of Orange County* do not require dismissal of the petition in this case. In addition, I find no *Poole Foundry*-based reason for dismissing this petition.[5] On this, I note that the parties' May 23 Memorandum of Agreement does not provide for any affirmative bargaining between the parties and what provisions are present do not require any reasonable period of time for their effectuation. Rather, the Memorandum of Agreement's provisions appear purely ministerial in nature. In such circumstances, I find no "reasonable period of time" settlement bar to the processing of this petition either.

Accordingly, I find that the following employees of the Employer constitute an appropriate unit within the meaning of Section 9(b) of the Act and that it is appropriate to direct an election in such a unit:

> All full-time and regular installer trainees, installers, advanced installers, technician trainees, installer technicians, service technicians, system technicians, advanced technicians, construction trainees, construction persons B, construction persons A, warehouse persons, and warehouse trainees employed by the Employer at its Santa Clara, California facility; excluding all other employees, guards, and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations.[6] Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of the Decision, including

---

[5] *Poole Foundry,* 95 NLRB 34 (1951).

[6] Please read the attached notice requiring that election notices be posted at least three (3) days prior to the election.

employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether or not they desire to be represented by TEAMSTERS UNION LOCAL NO. 78, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969); North Macon Health Care Facility, 315 NLRB 359, 361 fn. 17 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employers with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-5211, on or before November 28, 2000. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by December 5, 2000.

DATED AT Oakland, California this 21st day of November, 2000.

/s/ James S. Scott

_____

James S. Scott, Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5211

32-1209

347-6020-5033